(25)

Office - Supreme Court, U. S.
FILED
JUL 3 19
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 234

314-645

OMAHA PACKING COMPANY,
Petitioner,

vs.

PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY; THE PENNSYLVANIA RAILROAD COMPANY, AND THE ALTON RAILROAD COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN S. LORD,
AUSTIN V. CLIFFORD,
135 South La Salle Street,
Chicago, Illinois,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

PAGE

Petition for Writ of Certiorari..... 1

A. Summary Statement of the Matter Involved.. 1

B. The Basis of the Court's Jurisdiction..... 7

C. The Questions Presented..... 7

D. The Reasons Relied on for the Allowance of the Writ 8

Brief in Support of Petition..... 11

Reference to Report of Opinion Below..... 11

Grounds of Jurisdiction..... 11

Statement of the Case..... 12

Errors to Be Urged..... 12

Argument 13

I.

To Deprive a Plaintiff of the Right to Rely on the Doctrine of Res Ipsa Loquitur, the Evidence Must Show More Than the Physical Cause of the Injury—It Must Show the Responsible Human Cause..... 13

II.

The Illinois Law Is That There Is No Difference, So Far as Application of the Doctrine of Res Ipsa Loquitur is Concerned, Between Carrier-Passenger and Dangerous Agency Cases, on the One Hand, and Simple Negligence Cases on the Other..... 20

III.

The Circuit Court of Appeals Erroneously Held That, in a Res Ipsa Loquitur Case, the Evidence Must Exclude Causes Other Than Defendant's Negligence... 21

IV.

Petitioner's Tendered Instruction No. VII Did Not Authorize the Jury to Draw any Inference of Negligence Not Warranted by the Evidence..... 23

V.

A Federal Judge is Not a Mere Moderator, and If the Only Instruction Requested on a Material Point is Technically Defective, He Should Give a Correct One 24

Conclusion 25

Appendix A—The Underlying Theory of the Case.. 29

Appendix B—List of Authorities Holding That Evidence of the Precise Physical Cause of a Plaintiff's Injuries, or an Unsuccessful Attempt by Plaintiff to Prove the Specific Negligence of the Defendant Will Not Deprive Plaintiff of His Right to Rely on Res Ipsa Loquitur 31

TABLE OF AUTHORITIES CITED.

Cases.

Audubon Building Co. v. F. M. Andrews & Co., 187 F. 254, 260 (5 C. C. A.) 25

Bollenbach v. Bloomenthal, 341 Ill. 539, 546 8

Burdette v. Chicago Auditorium Ass'n., 166 Ill. App. 186, 190 ..... 14, 16

Byrne v. Boadle, 2 H. & C., 722 17

Chicago City Ry. Co. v. Barker, 209 Ill. 321, 326 ..... 8, 9, 22

Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 324, 325 ..... 8, 14, 20, 31

Chicago Union Traction Co. v. Giese, 229 Ill. 260, 263 9

Churchill v. Baltimore & O. R. Co., 30 F. Supp. 792 (D. C. W. D. Pa.) 18

Cincinnati etc. R. Co. v. South Fork Coal Co., 139 Fed. 528 (6 C. C. A.) 22

Cities Service Oil Co. v. Dunlap, 308 U. S. 208 13

Clarke v. Nassau El. R. Co., 9 App. Div. 51; 41 N. Y. S. 78, 80 22

Clement v. Metropolitan El. Ry. Co., 123 F. 271, 273, 274 (7 C. C. A.; 1903) 30

Coca Cola etc. Co. v. Munn, 99 F. (2d) 190, 193 (4 C. C. A.) 13

Colorado Springs, etc. Ry. Co. v. Reese, 69 Colo. 1; 169 Pac. 572, 575 (1917) 32

Dearden v. San Pedro, etc., R. Co., 33 Utah 147, 93 Pac. 271, 273 (1907) 32

Erie R. R. v. Tompkins, 304 U. S. 64 13

Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 445 ..... 16, 17, 31

Griffin v. Manice, 166 N. Y. 188, 193 21

Hagan and Cushing Co. v. Washington etc. Co., 99 F. (2d) 614, 616 (9 C. C. A.) 13
Herron v. Southern Pac. Co., 283 U. S. 91, 95 ..... 9, 24
Highland v. Wilsonian Investment Co., 171 Wash. 34; 17 Pac. (2d) 631, 633 (1932) 32
Houren v. Chicago, etc. Railway Company, 236 Ill. 620, 623, 625 (1908) 29
Hubbert v. Aztec Brewing Co., 26 Cal. App. (2d) 664; 80 P. (2d) 185, 1016, 1018 22
Humphrey v. Twin State Gas & Electric Co., 100 Vt. 414; 139 Atl. 440, 445 (1927) 32
Inland and Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 554, 614 ..... 2, 9, 12, 23, 24
Interstate Circuit, Inc. v. United States, 306 U. S. 208, 226 19
Kickels v. Fein, 104 Ind. App. 606; 10 N. E. (2d) 297, 301 (1937) 31
Kleinman v. Banner Laundry Co., 150 Minn. 515; 186 N. W. 123, 124 (1921) 31
Lee Line Steamers v. Robinson, 218 F. 559, 564 (6 C. C. A.) 21
Lowery v. Hocking Valley R. Co., 60 F. (2d) 78, 79 (6 C. C. A.) 16
F. W. Martin & Co. v. Cobb, 110 F. (2d) 159, 163 (8 C. C. A.) 13
Masten v. Cousins, 216 Ill. App. 268 ..... 8, 14, 31
Memphis etc. Co. v. Chapman, 62 F. (2d) 565, 567 (6 C. C. A.) 25
Neal v. T. Eaton Co., Ltd., 1933—3 D. L. R. 306 31
Nashville, etc. R. Co. v. Gregory, 137 Tenn. 422; 193 S. W. 1053, 1055 (1917) 32
North Chicago Street Ry. Co. v. Cotton, 140 Ill. 486, 494 ..... 8, 20

O'Rourke v. Marshall Field & Co., 307 Ill. 197, 200....8, 14
Page v. Keeves, 362 Ill. 64, 73..... 19
Partin's Admr. v. Black Mountain Corp., 248 Ky. 32; 58 S. W. (2d) 234 (1933)..... 31
Pennsylvania Co. v. Clark, 266 F. 182, 187 (6 C. C. A.) 31
Rex v. Canadian Tug Boat Co., Ltd., 1933 E. C. C. 104 31
Rotche v. Buick Motor Co., 358 Ill. 507, 515.....5, 17
San Juan Light & Transit Co. v. Requena, 224 U. S. 89 .....18, 31
Schlemmer v. Buffalo etc. R. Co., 205 U. S. 1, 12..... 14
Shea v. Hern, 132 Me. 361; 171 Atl. 248, 250 (1934)... 31
Sierocinski v. E. I. duPont etc. Co., 118 F. (2d) 531, 534-535 (3 C. C. A.)..... 13
Soto v. Spring Valley Water Co., 39 Cal. App. 187; 178 Pac. 306 18
Southland Greyhound Lines v. Frausto, 69 S. W. (2d) 497, 499, 500 (Texas Civil Appeals)..... 21
Sprinkle v. Davis, 104 F. (2d) 487 (4 C. C. A.).....9, 25
St. Paul etc. Company v. Bachmann, 285 U. S. 112, 118, 119 .....9, 25
Sutherland v. Payne, 274 F. 360, 361 (6 C. C. A.)..... 25
Sweeney v. Erving, 228 U. S. 233, 240.....22, 25
The Merchant Prince, 1892—P. D. 179 (Ct. of Appeals) 31
United States etc. Co. v. Des Moines Nat. Bank, 145 Fed. 273, 279 (8 C. C. A.)..... 21
Union Gas & Electric Co. v. Waldsmith, 31 Oh. App. 118; 166 N. E. 588, 590..... 31
Westchester Fire Ins. Co. v. Fitzpatrick, 2 F. (2d) 651, 654 (3 C. C. A.)..... 25
Wheeler v. Chicago etc. R. R. Co., 267 Ill. 306, 321.... 14

Statutes and Texts.

3 Cooley on Torts, 4th Ed., p. 381 21
Harper on Torts, p. 183 21
Holmes, The Common Law, pp. 122-123 15
Restatement of Torts, § 285 15
43 Stats. 938, ch. 229, § 1; 28 U. S. C. A. 347 (Judicial Code § 240(a)) 7, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

OMAHA PACKING COMPANY,

Petitioner,

vs.

PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY; THE PENNSYLVANIA RAILROAD COMPANY, AND THE ALTON RAILROAD COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

Petitioner, Omaha Packing Company, respectfully shows:

A. Summary Statement of the Matter Involved.

Petitioner, plaintiff-appellant below (a Kentucky corporation), brought an action against respondents, defendants-appellees below (corporations of states other than Kentucky), which was removed to the United States District Court for the Northern District of Illinois, Eastern Division, to recover damages in the amount of $636,489.31 to

petitioner's meat packing plant and its contents from a fire which originated in a nearby grain elevator and spread to petitioner's plant as the result of a thirty-minute delay of a fire-boat proceeding to the fire, which delay was caused by the failure of respondents' (jointly operated) drawbridge to open on receiving the proper signal.[1] The jury returned a verdict for respondents. Judgment on the verdict was affirmed.

At the trial, petitioner introduced evidence showing the mechanical defect responsible for the failure of respondents' bridge to rise, but not the cause of that defect. Petitioner, contending that the doctrine of *res ipsa loquitur* applied, tendered a written instruction applying that doctrine, based on *Inland and Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551. The trial judge refused to give the instruction, and told the jury, "* * * you should not base a verdict upon the proposition merely that because defendants' equipment failed that somebody connected with the defendants must pay for the damages ensuing. You must not jump at those conclusions regardless of any question of negligence. It would not be right for you to do that" (614).[2]

The Circuit Court of Appeals affirmed, holding that, though the doctrine of *res ipsa loquitur* was applicable to the failure of the drawbridge to rise on proper signal, proof by petitioner of the physical cause, as distinguished from the human cause responsible for the physical cause, of the failure of the bridge deprived petitioner of the benefit of the doctrine, and that the requested instruction was technically improper.

No question arises on the pleadings. The Circuit Court of Appeals properly found it unnecessary to state the evidence on questions of proximate cause and amount of dam-

1. For the underlying theory of the cause of action, see Appendix A (*infra*, p. 29).

2. Figures in parenthesis refer to pages of the printed record, unless otherwise stated.

ages (839), so in this petition, the statement will be confined to the evidence bearing on negligence.

Petitioner's plant was situated on the north bank of the south branch of the Chicago River, a navigable river (367), just west of Halsted Street. Immediately west, separated by from 85 to 156 feet of open ground, was the Quincy Elevator where the fire originated (268, Ex. 64, 653). Respondents' bridge crosses the river at Stewart Avenue, some 4,000 feet northeast of the west end of petitioner's plant (Ex. 23, 643). The bridge opened to permit the passage of boats by vertically lifting its 200-foot span to a height of 111 feet above the river (101). The bridge carried the two main line tracks of the Pennsylvania and Alton Railroads into the Chicago Union Station (415) over which passenger trains passed approximately every half hour (416). The bridge was operated by electric power by a lever man employed by respondents stationed in a shanty just off the bridge at its southeast corner (101). For the safety of passenger traffic, the lifting was regulated by an interlocking device controlled by seven levers, five of which were necessary to any operation, the functions of which were to set signals and derails against oncoming trains, pull plungers in the south and north ends of the bridge and make electric connections which gave power to the bridge operator to raise the removable span (101-102). If any one of the five levers could not be thrown, the bridge operator could not raise the bridge as he had no electric power.

The fire which caused the damage was discovered a few minutes before 3:28 P. M., Chicago Daylight Saving Time, on August 4, 1932 (270). At 3:28 P. M. the first alarm was received. An Acting Battalion Chief arrived, ordered a 4-11 alarm at 3:31 P. M. and a 5-11 alarm at 3:36 P. M. (176). These alarms brought out some 80 land fire companies, which succeeded in saving the north end (331) of

petitioner's plant (away from the river), but were unable effectively to fight the fire along the river front (97, 173), at which point it spread to petitioner's plant. Special alarms followed later (Ex. 22, 639).

The 4-11 alarm started the fire boat Graeme Stewart from its station at the foot of Franklin Street up the river to the fire (80). The boat was equipped with two powerful turret nozzles (75, 82), capable of throwing 9,000 gallons of water per minute (82), and was the equivalent of approximately ten land companies (75). The boat made a perfect run through 13 drawbridges, arrived at respondents' drawbridge and stopped at 3:45 P. M. (81, 105) because of the failure of the bridge to rise.

The lever man in the shanty had been informed by telephone of the approach of the fire boat at 3:37 P. M., and had prepared to make the lift but was unable to place No. 3 lever in normal position (103, 104). Petitioner called as witnesses, Pavelchick, defendants' lever man, and Chichocki, a signal maintainer employed by another railroad, whom the lever man had called to his assistance (101, 159). From their testimony, it developed that the failure of lever No. 3 to function was due to the fact that something was wrong in the lever box which contained the control mechanism operated by lever No. 3 (104, 160). This lever box was locked and sealed, and only certain trusted employees of respondent had keys to open it (390, 401). Certain parts of the control mechanism in it were connected by a round brass pin extending through openings in such parts. This pin was about two inches long and one-eighth of an inch in diameter and projected a short distance on either side of the connected parts (170). There was a small hole at each end of this pin into which a cotter key was inserted (163). The pin fit loosely enough so that it could revolve (405). The function of the cotter keys was to hold the pin in its proper place. Under the Illinois law, it is negligence not to spread

the free ends of a cotter key. *Rotche* v. *Buick Motor Co.*, 358 Ill. 507.

Pavelchik, after obtaining permission by telephone, broke the seal, opened the lever box, and tried to determine what was the matter (109, 110). Chichocki, after watching Pavelchik try to fix the apparatus (111), with the fire boat waiting outside, finally went over to the lever box (127), found the pin on the floor of the lever box, with a cotter key properly clenched in one end of the pin but no cotter key in the other end (165). He inserted the pin in the connected parts after bringing them into alignment (160) and told the lever man to raise the bridge. This was done (122). Chichocki's investigation and replacement of the pin took 2 to 4 minutes (160).

The fire boat was thus delayed from 3:45 to 4:16 (122) and arrived at the fire at from 4:22 to 4:25 (81-82). The numerical weight of the evidence indicated that the fire spread from the Quincy Elevator to the petitioner's plant between 3:51 and 4:01 P. M.[3]

Respondents introduced testimony of their signal man who installed the interlocking device. He said that if he opened lever box No. 3 and saw that the pin, from which the cotter key was missing, was out of its proper position, he would know why the lever failed to work electrically (413), and also that the interlocking device could have been picked by hand in a minute or two (409, 412). He also testified that lever box No. 3 was kept shut by a special Yale padlock made for this division of the Pennsylvania Railroad (389) and that the other employees besides himself who had keys to the lever box were the signal supervisor, the assistant

3. This statement summarizes the weight of the testimony of a large number of witnesses, viz.: Firemen McGrath (92), Gough (96), Lunn (172), Andrews (177), Burns (184), Grueneich (186), Love (187), Koller (191), Blair (193), Radke (195-6), Ford (200), Leahy (204), Butler (209), Larson (210), Hurst (219), Sulkowski (220), Felker (225), Martin (227), Lambert (236), McCurrie (239), Haberkorn (243), Cornell (247), Crane (252), Doyle (253), Conway (254), Maher (256), Semon (258), Dingels (259), Kemp (264), Gillespie (266), Smith (281), Geary (307), Daley (309), Johnson (310), Seemann (311), Scanlon (312), Walsh (490), Oelrich (495), Collins (497), Kennedy (499), Honan (499) and Morrison (509); and other witnesses, Johnstone (280), Nowicki (283), Mette (285), Koch (297-8), Schaack (301) and Sieger (324).

supervisor, the foremen, and the signal men, but no helpers (390). The chief engineer of the Union Switch and Signal Company, the manufacturer of the interlocking device, testified to its wide use (416) and testified as an expert that in his opinion, it was a safe and proper device for the purpose for which it was ordinarily intended, that is, to make it as safe as humanly possible to operate trains over the bridge (418-419). Heitz, a signal maintainer for the respondents, testified that it was a part of his regular duties to inspect the interlocking plant (420), that part of his inspection was to open lever box No. 3 and to look inside to see if the pin was inside and also the cotter keys (422). He testified that he inspected this lock a week before the fire in the Omaha plant and on that occasion he was sure that the cotter keys were in and "split" so they couldn't fall out (422, 428).

There was no evidence in the entire record that the missing cotter key, or broken fragments of it, were found in the lever box when it was opened or immediately thereafter, although the locked box was opened in the presence of respondents' employees (111).

The trial court held, and the Circuit Court of Appeals agreed, that the foregoing testimony eliminated petitioner's right to rely on the doctrine of *res ipsa loquitur*, and so justified the refusal (561, 600) to give petitioner's requested instruction No. VII [4] (770), based on that doctrine. Petitioner contends that this evidence fails entirely to show the responsible human cause—*i. e.*, the specific negligence, which resulted in the absence of the cotter key, that only proof of such responsible human cause would deprive petitioner of the benefit of the doctrine of *res ipsa loquitur*, that the requested instruction was proper, and that even if it were technically incorrect, the trial court should have given some proper instruction applying the doctrine of *res ipsa loquitur*.

4. Set out in full, *infra*, p. 24.

B. The Basis of the Court's Jurisdiction.

This Court may by certiorari have this cause certified to it for determination under the Act of February 13, 1925; 43 Stats. 938, Ch. 229 § 1; 28 U. S. C. A. § 347 amending and reenacting § 240(a) of the Judicial Code.

C. The Questions Presented.

Four questions, the answers to which will clarify the procedure in cases involving the doctrine of *res ipsa loquitur*, and one question as to the duty of a trial judge in giving or refusing instructions, are presented, viz.:

1. Whether, in a situation in which the doctrine of *res ipsa loquitur* would otherwise apply, a plaintiff who proves the physical cause of his injury, but not the human act or omission which resulted in the physical cause, is thereby deprived of the right to rely on the doctrine of *res ipsa loquitur*.

2. Whether there is any valid basis for a distinction, so far as the application of the rule of *res ipsa loquitur* is concerned, between cases involving a carrier-passenger relation, or an inherently dangerous agency on the one hand, and cases involving simple negligence on the other.

3. Whether in a *res ipsa loquitur* case, it is necessary for the evidence to exclude all other possible causes of the injury than defendant's negligence.

4. Whether an instruction on the subject of *res ipsa loquitur* must limit the permissible inference of negligence to the precise physical cause of the injury, or whether it may allow a general inference of negligence unless upon the whole evidence the inference is rebutted.

5. Whether a Federal trial judge to whom is tendered a technically defective instruction applicable to a material

point not otherwise covered may refuse the instruction without correcting it or substituting a proper one to cover the same subject matter.

D. The Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals decided (848-850) an important question of local law in a way probably in conflict with applicable local decisions, in holding that plaintiff's evidence of the precise physical (*i. e.*, mechanical) cause of an injury as distinguished from the human act or omission responsible for the mechanical cause is sufficient to deprive plaintiff of the right to rely on the doctrine of *res ipsa loquitur*.

North Chicago Street Ry. Co. v. *Cotton*, 140 Ill. 486, 494.

Chicago City Ry. Co. v. *Carroll*, 206 Ill. 318, 324-325.

O'Rourke v. *Marshall Field & Co.*, 307 Ill. 197, 200.

Bollenbach v. *Bloomenthal*, 341 Ill. 539, 546.

Masten v. *Cousins*, 216 Ill. App. 268.

2. The Circuit Court of Appeals decided (847) an important question of local law in a way probably in conflict with applicable local decisions, in holding that there is some difference between carrier-passenger situations and highly dangerous agency situations on one hand, and ordinary tort situations on the other, so far as the application of the doctrine of *res ipsa loquitur* is concerned.

North Chicago Street Ry. Co. v. *Cotton*, 140 Ill. 486, 494.

Chicago City Ry. Co. v. *Carroll*, 206 Ill. 318, 324-325.

Chicago City Ry. Co. v. *Barker*, 209 Ill. 321, 326.

3. The Circuit Court of Appeals decided (850) an important question of local law in a way probably in conflict with applicable local decisions in holding that, before *res ipsa loquitur* is applicable, the evidence must be such that negligence of the defendant is the only conclusion that can reasonably be drawn from the evidence as the cause for the damage.

Chicago City Ry. Co. v. *Barker*, 209 Ill. 321, 326.

Chicago Union Traction Co. v. *Giese*, 229 Ill. 260, 263.

4. The Circuit Court of Appeals decided (848-849) an important question of Federal law in a way probably in conflict with the applicable decisions of this Court in holding that the petitioner's requested instruction No. VII, if given, would have permitted an inference of negligence as to anything which occurred in connection with the inspection and maintenance of the bridge, and did not limit the inference of negligence to the cotter key, the Court thus ignoring the last clause of the requested instruction, "unless, upon the whole evidence, such prima facie evidence is rebutted."

Inland & Seaboard Coasting Co. v. *Tolson*, 139 U. S. 551.

5. The Circuit Court of Appeals decided (852) an important question of Federal law in a way probably in conflict with the decisions of this Court in holding that when the written requests for instructions on a material point not otherwise covered are technically defective, a Federal trial judge is under no independent duty to supply a correct instruction on that point.

St. Paul etc. Company v. *Bachmann*, 285 U. S. 112, 118.

Herron v. *Southern Pac. Co.*, 283 U. S. 91, 95.

Sprinkle v. *Davis*, 104 F. (2d) 487 (4 C. C. A.).

WHEREFORE, petitioner prays for the allowance of the Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled cause in order that said case may be reviewed and determined by this Honorable Court.

OMAHA PACKING COMPANY,
By JOHN S. LORD,
AUSTIN V. CLIFFORD,
Attorneys for Petitioner
135 South La Salle Street
Chicago, Illinois.